SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: CRIMINAL TERM: PART 30

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THE PEOPLE OF THE STATE OF NEW YORK,

Present:
Hon. Elizabeth A. Foley

v.

INDICTMENT
NO. 4041-2011

LYNDEN JOHNSON,

DECISION
AND ORDER

Defendant.

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Defendant moves pro-se pursuant to CPL §440.10(1)(h) to vacate his judgment of conviction, obtained by his plea of guilty to Criminal Sexual Act in the Second Degree, claiming his plea was not voluntary or knowing because he received ineffective legal representation, *i.e.*, his attorney allegedly failed to advise the Court of Mr. Johnson's medical condition of being schizophrenic. The defendant asserts that as a failure of his attorney to explore his mental condition, he was denied his right to effective legal counsel. After a review of the moving papers, the People's Affirmation in Opposition, the pertinent Supreme Court file and relevant statutory and caselaw authority, defendant's motion is denied.

On or about and between April 1 and April 30, 2011, defendant, then over the age of 18 years old, engaged in oral sexual conduct with his daughter, who was then under the age of 15 years old. Defendant was subsequently identified by his daughter from a confirmatory photograph, and defendant provided a written

confession to the police. Thereafter, defendant was charged under Indictment No. 4041/11 with multiple counts of Criminal Sexual Act in the Second Degree and Incest in the Second Degree, as well as other related charges

On August 25, 2011 this Court ordered[1], that the defendant undergo a psychiatric evaluation, pursuant to Criminal Procedure Law 730.30(1), to determine whether the defendant as a result of mental disease or defect, lacked the capacity to understand the proceeding against him or assist in his defense. [2]

On September 12, 2011, psychiatrist Steven Rubel, M.D., and psychologist Liang Shao, Ph.D., conducted a psychiatric examination of the defendant pursuant to this Court's order (C.P.L. Article 730 Examination Report dated September 12, 2011 [hereinafter, 730 Report"]). Defendant's 730 Report stated his history of schizophrenia and depression and informed the examiners he was fully complaint with taking his Risperdal and Zoloft at the MO unit in Jail. The defendant denied any current auditory or visual hallucinations. It was the evaluators professional opinion that [defendant] was able to assist in his legal proceedings and was capable of working with his attorney if he chose to do so.

On May 10, 2012 , following plea negotiations the defendant, represented by Paul Hirsch, Esq., agreed to plead guilty to Criminal Sexual Act in the Second

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[1] The Examination to Be Ordered form dated August 25, 2011 in the Supreme Court file.

[2] The Order for Psychiatric Evaluation dated August 25, 2011.

Degree, in full satisfaction of the indictment and in exchange for a promised sentence of a term of imprisonment of 1 ½ years, followed by 10 years of post release supervision.

On May 29, 2012 this court imposed the bargained-for sentenced for a term of 1 ½ years, to be followed by ten years of post-release supervision. The defendant was re-sentenced on August 9, 2012, to a term of one year to be followed by ten years of post release supervision.

On September 13, 2012 defendant moved, pursuant to CPL 440, to vacate the judgement of his conviction in this case, asserting that he was denied his right to effective assistance of counsel due to his attorney allegedly not advising him of the immigration consequence of his guilty plea. The people opposed, and by decision and order dated June 3, 2013 the defendant's motion was denied. On December 13, 2012, an immigration Judge ordered defendant to be removed to the Bahamas based upon defendant's instant conviction.

In defense's instant motion, guised as a motion to reargue, defendant moves again pursuant to CPL 440 to vacate his judgement alleging ineffective assistance of counsel. The defendant asserts that his counsel did not fully explore his mental health illness and did not "effectively advance that knowledge to the Court" and as a result the defendant was not afforded the opportunity to adequately participate in his defense. Defendant points to his plea allocution in which defense counsel

stated that the defendant was "unhappy" with his plea, and that should have been some indicia to the court, that despite defendant being found fit after a 730 examination, that the defendants mental faculties may have been impaired.

Defendant's claim is procedurally barred under Criminal Procedure Law Section 440.10(3)(c), which provides that the court may deny a motion to vacate when...[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issues underlying the present motion but did not do so." See *People v Graves*, 62 AD3d 900, 878 N.Y.S.2d 630 (2d Dept 2009), lv denied 13 N.Y.3d 939, 922 N.E.2d 918, 895 N.Y.S.2d 329 (2010); *People v Cochrane*, 27 AD3d 659, 810 N.Y.S.2d 670 (2d Dept 2006), lv denied 7 N.Y.3d 787, 854 N.E.2d 1280, 821 N.Y.S.2d 816 (2006), cert denied 549 U.S. 976, 127 S. Ct. 436, 166 L. Ed. 2d 310 (2006). Defendant's "new evidence" he avers to was available to him at the time in which he made his initial 440 motion. Defendant was aware of his mental health issues at the time he made his initial motion, as the defendant has been treated for his illness for many years, subsequently this issue could have been addressed in defendants prior claim.

The Court also finds despite the procedural bar, the defendant's arguments are without merit. Defendant contends that his counsel did not inform the court of the defendant's history of mental illness, yet that assertion is unsupported by the record. The Court received and reviewed defendant's 730 report which outlined

defendant's mental history, the report details the defendant's diagnosis of schizophrenia and depression and subsequent medication. The 730 report found that the defendant, who was compliant with his medication, was able to assist with his defense. The defendant also contends that his attorney indicating to the court that he was "unhappy", should have ceased the plea negotiations as it was an emotion and as such should have been delved into further by his counsel. Yet, this assertion is also contradicted by the record. After Defendant was advised that he may be deported the Court had the following colloquy with the defendant:

The Court: You understand that it is likely that you will be deported?

Mr. Hirsch: He understands that. He is not happy with it, obviously.

The Court: Well, you don't have to take the plea.

Mr. Hirsch: Yes.

The Court: Do you understand that?

The Defendant: Yes

The Court: All right. And you still want to go forward here?

The Defendant: Yes.

If the defendant was unhappy with the plea that he was accepting, the defendant recourse would been to have rejected the plea. *People v. Thompson*, 174 A.D.2d 702 (N.Y. App. Div. 2d Dep't 1991), The defendant was afforded an opportunity to reject the plea at the moment when the Court inquired whether or

not the defendant wished to proceed, and the defendant chose not to.

A defendant in a criminal proceeding is entitled to effective assistance of counsel under the federal and state constitutions. *See, generally, People v. Linares*, 2 NY3d 507 (2004). To prevail on an ineffective assistance of counsel claim under the federal standard, a defendant must first be able to show that counsel's representation fell below an "objective standard of reasonableness" based on prevailing professional norms; it is defendant's burden to establish "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See, Strickland v. Washington,* 466 US 668, 687-688 (1984). Counsel is "strongly presumed" to have exercised reasonable judgment in all significant decisions. *Id.* at 690.

A defendant must also "affirmatively prove prejudice" by showing that were it not for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different; a reasonable probability in this context is "probability sufficient to undermine confidence in the outcome." *Id.* at 693, 694. Furthermore, in assessing prejudice under *Strickland* "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S Ct 770, 792 (2011). Thus, the *Strickland* standard is "highly demanding" (*Kimmelman v. Morrison*, 477 US 365, 382 [1986]) and "rigorous" (*Lindstadt v. Keane*, 239 F3d 191, 199 [2nd Cir. 2001]). Where a

defendant enters his plea upon the advice of counsel, he must show that, but for counsel's errors, he would not have pleaded guilty and instead insisted on going to trial. *Hill v. Lockhart*, 474 US 52, 59 (1985).

In New York, a defendant's right to the effective assistance of counsel is violated when "defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure." *People v. Turner*, 5 NY3d 476, 479 (2005). To meet this standard, defendant "must overcome the strong presumption" that he was represented competently. *People v. Ivanitsky,* 81 AD3d 976 (2nd Dept. 2011), *lv denied*, 18 NY3d 925 (2012); *People v. Myers*, 220 AD2d 461 (2nd Dept.), *lv denied*, 87 NY2d 905 (1995). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi,* 54 NY2d 137, 147 (1981). In the context of a guilty plea, a defendant has been afforded meaningful representation when he receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel. *See, People v Ford*, 86 NY2d 397 (1995); *People v. Caruso*, 88 AD3d 809 (2nd Dept. 2011), *lv denied*, 18 NY3d 923 (2012); *People v. Hawkins*, 94 AD3d 1439 (4th Dept.), *lv denied*, 19 NY3d 974 (2012).

While the deficiency prong under State law is identical to that in *Strickland*,

the prejudice prong in New York is "somewhat more favorable to defendants." *People v. Turner, supra* at 480. "[T]he claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v. Benevento*, 91 NY2d 708, 714 [1998]), and the "question is whether the attorney's conduct constituted 'egregious and prejudicial' error such that defendant did not receive a fair trial." *Id.* at 713 (internal citation omitted). Thus, a defendant's showing of prejudice is a "significant but not indispensable element in assessing meaningful representation." *People v. Stultz*, 2 NY3d 277, 284 (2004).

The Court does not perceive that any prejudice has been suffered by defendant due to the unsupported allegation that defendants mental illness was not known to the court. A defendant's statement is insufficient in and of itself to sustain the burden of showing prejudice; prejudice must be corroborated independently by objective evidence, as a claim that defendant "would have gone to trial but for counsel's alleged ineffectiveness, standing alone, does not establish prejudice under *Strickland.*" *Boakye v. U.S.*, __ FSupp2d __, 2010 WL 1645055 (SDNY). Here, defendant's bare claim he would have insisted on proceeding to trial is not sufficient. *Compare, People v. Picca, supra* at 183-186; *see also, People v. Ozuna*, 7 NY3d 913 (2006). Defendant's self-serving, statement is

utterly without support and is insufficient to avoid summary denial of the motion to vacate his judgment of conviction.

In short, the Court finds defendant's broadly asserted charge that his prior attorney failed to advise the Court of his mental health illness be wholly unsubstantiated and without merit. There is no credible dispute that the prior proceedings were understood by defendant, and his plea was not baseless. In the Court's opinion, defendant's assertions do not "overcome the presumption of effectiveness and show that counsel failed to provide 'meaningful representation' (*People v. Jackson*, 70 NY2d 768, 769 [])." *People v. Hayes*, 186 AD2d 268 (2nd Dept. 1992). Thus, defendant's motion to vacate his judgment of conviction based upon the purported ineffectiveness of prior counsel is entitled to no further consideration and is denied. *See generally, People v. McDonald*, 1 NY3d 109 (2003); *People v. Toal*, 260 AD2d 512, (2nd Dept.), *lv denied*, 94 NY2d 830 (1999); *People v. Marcano*, 114 AD2d 976 (2nd Dept. 1985); *compare, People v. Picca, supra* at 178-180.

The Court has reviewed the defendant's remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED, that defendant's motion is denied.

ENTER

Dated: October 7, 2014

ELIZABETH A. FOLEY, J.S.C.

You are advised that your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made under CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under Article 440, you must apply to a Justice of the Appellate Division for a certificate granting leave to appeal. This application must be filed within 30 days after your being served by the District Attorney or the court with the court order denying your motion.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court order and a copy of any opinion of the court. In addition, you must serve a copy of your application on the District Attorney.

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